

Arthur W. Fleishman, CA Bar No. 222886  
awf@mdd-law.com  
McClosky, D'Anna & Dieterle, LLP  
2300 Glades Road  
Suite 400, East Tower  
Boca Raton, FL 33431  
Telephone: (561) 368 - 9200  
Facsimile: (561) 395 - 7050

Attorneys for Defendants,  
IMARKETING CONSULTANTS, INC., *et al.*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ASIS INTERNET SERVICES, a California corporation,

Case No.: C 07-05357 CW

**Plaintiff,**

vs.  
IMARKETING CONSULTANTS, INC., dba  
ULTRA-MX.COM, also dba SPEED  
NETWORK, also dba SPEED-MX.COM, and  
DOES ONE through FIFTY, inclusive.

**DEFENDANT IMARKETING  
CONSULTANTS, INC.'S NOTICE OF  
MOTION TO DISMISS COMPLAINT OR  
TRANSFER TO THE SOUTHERN  
DISTRICT OF FLORIDA AND  
MEMORANDUM OF POINTS AND  
AUTHORITY IN SUPPORT THEREOF**

### Defendants.

**I. NOTICE OF MOTION TO DISMISS THE COMPLAINT OR TRANSFER TO  
THE SOUTHERN DISTRICT OF FLORIDA**

Defendant Imarketing Consultants, Inc. (“Imarketing”), by and through its undersigned counsel and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, hereby files notice of its motion to dismiss Plaintiff ASIS Internet Services’ Complaint for Damages and Injunctive Relief (“Complaint”) or, in the alternative, to transfer the action to the Southern District of Florida, and states:

Plaintiff filed its Complaint against Imarketing, as well as purported aliases and unknown individuals, alleging violations of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. §§ 7701 et seq., seeking injunctive relief, statutory damages, aggravated damages, and attorney’s fees. These allegations, even if true, are insufficient to establish liability under the CAN-SPAM Act. The

## **Exhibit A**

1 instant action is one of several filed by Plaintiff in this Court over the past six (6) months  
2 alleging violations of the CAN-SPAM Act against various companies. While counsel will not  
3 address the factual and legal sufficiency of the complaints filed in the other actions, the  
4 Plaintiff's Complaint filed in the instant action must be dismissed as to Imarketing based on the  
5 following: (a) lack of jurisdiction over Imarketing; (b) improper venue; (c) failure to plead with  
6 the requisite particularity; and (d) failure to state a claim upon which relief may be granted.  
7 Accordingly, Imarketing respectfully requests this Court dismiss the Complaint or, in the  
8 alternative, transfer the case to the Southern District of Florida.

## 9 II. MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT THEREOF

### 10 A. This Court Lacks Personal Jurisdiction Over Imarketing.

11 Plaintiff is a California corporation that provides internet services. Imarketing is a  
12 Florida corporation. Plaintiff alleges that this Court has original jurisdiction pursuant to the 28  
13 U.S.C. § 1331 and the CAN-SPAM Act. Complaint ¶ 1.

14 Plaintiff states that: "This Court has personal jurisdiction over Defendants  
15 IMARKETING CONSULTANTS, INC., who maintain[s] offices in Delray Beach, Palm Beach  
16 County, Florida. Plaintiff believes and is informed and therefore alleges that the other dba's  
17 named in this suit are copyrighted names, service marks or domain names owned by  
18 IMARKETING CONSULTANTS, INC." Complaint ¶ 2. Plaintiff is uncertain whether  
19 Imarketing is the sender of the alleged spam, but makes conclusory allegations in an attempt to  
20 establish jurisdiction. Complaint ¶ 2, ¶ 5. Plaintiff asserts that: "Defendants have purposely  
21 availed themselves of the privileges of conducting activities in the forum, the emails are the  
22 subject of the action, and exercise of jurisdiction is reasonable since Defendants should have  
23 known they would be subject the jurisdiction and laws of the forum when commercial email  
24 accounts at a Northern California Internet Access Provider." Complaint ¶ 6.

25 Plaintiff's assertion of personal jurisdiction is based only on Plaintiff's  
26 assumptions that Imarketing caused the harm alleged. Further, as discussed below, no violation  
27 of the CAN-SPAM actually occurred based on the exhibits attached to the Complaint and  
28

1 Plaintiff's own allegations. Therefore, the Complaint must be dismissed for this Court's lack of  
 2 personal jurisdiction over Imarketing.

3 "Where no applicable federal statute governs personal jurisdiction, federal courts  
 4 apply the law of the state in which the court sits." Silverstein v. Experienced Internet.com, Inc.,  
 5 Not Reported in F.Supp.2d, 2005 WL 1629935 \* 1 (N.D. Cal. July 11, 2005) (*citing Core-Vent*  
 6 Corp. v. Nobel Industries AB, 11 F.3d 1482, 1484 (9th Cir.1993)). The only cause of action in  
 7 the instant action is under the CAN-SPAM Act, which allows for a provider of internet access  
 8 service to bring a civil action for violations of CAN-SPAM "in any district court of the United  
 9 States with jurisdiction over the defendant." Since the CAN-SPAM Act does not specify the  
 10 court's jurisdictional reach, state law governs. Id. (*citing Core-Vent Corp.*, 11 F.3d at 1484).

11 "California's long-arm statute allows courts to exercise personal jurisdiction over  
 12 defendants to the extent permitted by the Due Process Clause of the United States Constitution."  
 13 Id. at \* 2 (*citing* Cal.Code Civ. Pro. § 410.10 ("A court of this state may exercise jurisdiction on  
 14 any basis not inconsistent with the Constitution of this state or of the United States."); Core-  
 15 Vent, 11 F.3d at 1484). Therefore, this Court "need only determine whether personal jurisdiction  
 16 in this case would meet the requirements of due process." Id. (*citing Brainerd v. Governors of*  
 17 the Univ. of Alberta, 873 F.2d 1257, 1258 (9th Cir.1989)).

18 "Due process requires that 'in order to subject a defendant to a judgment in  
 19 personam, if he be not present within the territory of the forum, he have certain minimum  
 20 contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair  
 21 play and substantial justice.'" Id. (*quoting International Shoe Co. v. Washington*, 326 U.S. 310,  
 22 316 (1945)). A due process analysis will determine whether a state may exercise jurisdiction,  
 23 whether general or specific, over a defendant. Helicopteros Nacionales de Colombia, S.A. v.  
 24 Hall, 466 U.S. 408, 414-15 (1984). "If a defendant's activities within the forum state are  
 25 'continuous and systematic' or 'substantial,' the state has a sufficient relationship with the  
 26 defendant to assert general jurisdiction." Silverstein, 2005 WL 1629935 at \* 2 (*quoting Perkins*  
 27 v. Benguet Consol. Mining Co., 342 U.S. 437, 445-447 (1952)). In the instant action, Plaintiff  
 28 has not and cannot show California has general jurisdiction over Imarketing. If a forum state

cannot assert general jurisdiction over the defendant, the state may still assert specific jurisdiction depending on the quality and nature of the defendant's contacts with the forum state in relation to the cause of action. *Id.* (*citing Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9 Cir.1977)).

Plaintiff argues this Court has specific jurisdiction over Defendants because Defendants purportedly sent multiple commercial email messages to accounts at a Northern District of California Internet Access Provider. However, at this time, it is unclear who sent the emails. Moreover, Imarketing is not doing business in California, has no employees or customers in California, does not advertise in California, owns no property in California, does not have an address or phone listing in California, and is not sending emails to anyone in California. *See* Affidavit of Robert Clouse, Imarketing CEO, which is attached hereto as "Exhibit1." Plaintiff cannot show otherwise.

**B. The Northern District of California Is Not the Proper Venue for This Action.**

14 Plaintiff further asserts: "Venue is proper in this Court pursuant to 28 U.S.C.  
15 1391(b) and is founded on the fact that a substantial part of the unlawful action occurred in this  
16 judicial district." Complaint ¶ 7. 28 U.S.C. 1391(b) provides:

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

23 28 U.S.C. 1391(b). Imarketing resides in Delray Beach, Palm Beach County, Florida, which is  
24 in the Southern District of Florida. Plaintiff does not allege any events that occurred in Northern  
25 District of California except that “emails were to email accounts at a Northern California Internet  
26 Access Provider.” Complaint ¶ 6.

27 Based on Plaintiff's allegations we must determine whether the significant event  
28 was sending the emails or receipt of the emails. This is further complicated by the fact that these

1 emails did not cause any harm or injury in the Northern District California, as they were, by  
 2 Plaintiff's own admission, sent to unassigned or inactive email accounts owned by Plaintiff.  
 3 Complaint ¶ 14. Nevertheless, Plaintiff is not certain that the emails were sent by Imarketing and  
 4 has not alleged any events justifying the Northern District of California as the proper forum.

5 Litigating the instant action in the Northern District of California will be costly  
 6 for Imarketing, which has its principal place of business in the Southern District of Florida.  
 7 Furthermore, the evidence and witnesses for Imarketing are all in Southern District of Florida.  
 8 Moreover, the action could and should have been brought in the Southern District of Florida.  
 9 28 U.S.C. § 1404, provides: "For the convenience of parties and witnesses, in the interests of  
 10 justice, a district court may transfer any civil action to any other district or division where it  
 11 might have been brought." Thus, 28 U.S.C. § 1404 authorizes a district court to transfer any  
 12 civil action to any other district or division where the action might have been brought, for the  
 13 convenience of the parties and witnesses, if the transferee court is one in which proper venue can  
 14 be laid, where the case might have been brought originally, and one which will have jurisdiction  
 15 of the subject matter and over the parties. Based on the above stated criteria, the facts of the  
 16 instant case stated herein and Imarketing's CEO Robert Clouse's Affidavit, this action could  
 17 have been brought and should have been brought in the Southern District of Florida. For the  
 18 reasons asserted herein, if this case is not dismissed, the equities and general interests of justice  
 19 favor transferring this case to the Southern District of Florida.

20       **C.     Plaintiff's CAN-SPAM Act Claim Is Not Pleaded With the Requisite**  
 21 **Particularity.**

22       A complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules  
 23 of Civil Procedure where there is either a "lack of cognizable legal theory" or the absence of  
 24 sufficient facts to support a cognizable legal theory. Balestreri v. Pacifica Police Dept., 901 F.2d  
 25 696, 699 (9th Cir. 1990). Although this Court must take all material allegations in a complaint as  
 26 true and construe them in the light most favorable to the Plaintiff, this Court is not required to  
 27 accept legal conclusions cast in the form of factual allegations, unwarranted deductions of fact,  
 28 or unreasonable inferences. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.

1 2001); Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). Although this  
 2 Court is generally confined to consideration of the allegations in the pleadings, when a complaint  
 3 is accompanied by attached documents, such documents are deemed part of the complaint and  
 4 may be considered in evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston  
 5 Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

6 “In all averments of fraud or mistake, the circumstances constituting fraud or  
 7 mistake shall be stated with the requisite particularity.” Fed.R.Civ.P. 9(b). In the Complaint,  
 8 Plaintiff simply alleges that the emails sent by Defendants were “accompanied by header  
 9 information that was materially false or materially misleading.” Complaint ¶ 19. Plaintiff’s  
 10 Complaint is not pleaded with the requisite particularity for averments of fraud, including why  
 11 the header was misleading.

12 This Court, in a similar case involving the same Plaintiff in the instant action, has  
 13 held that the required elements for a CAN-SPAM Act claim do not include all of the elements of  
 14 common law fraud and that Rule 9(b) does not necessarily apply to all claims under the Act.  
 15 ASIS Internet Services v. Optin Global, Inc., 2006 WL 1820902 \* 3 (N.D. Cal. June 30, 2006)  
 16 (Not Reported in F.Supp.2d) (*citing Gordon v. Impulse Marketing Group, Inc.*, 375 F.Supp.2d  
 17 1040 (E.D. Wash. 2005)). It appears that Rule 9(b) is to be used more as a guidepost in  
 18 evaluating the pleadings. This Court determined that it must look to whether “Plaintiff has  
 19 alleged either some fraudulent conduct or a course of fraudulent conduct.” Id. at \* 4. But, this  
 20 Court held that “[i]f Plaintiff chooses to base its CAN-SPAM claim on the nature of the allegedly  
 21 fraudulent subject lines, this must be plead with particularity.” Id. at \* 5.

22 In the instant action, Plaintiff’s claim is based primarily on allegedly fraudulent  
 23 subject lines in violation of 15 U.S.C. § 7704(a)(1). Plaintiff alleges that: “all of the relevant  
 24 electronic mails sent by the Defendants on May 10, 2007, through September 4, 2007, contained  
 25 or were accompanied by header information that was materially false or materially misleading.”  
 26 Complaint ¶ 19. Plaintiff, however, does not specifically allege the content of the emails  
 27 themselves, including their headers and subject line information, or otherwise provide an  
 28 example or specify the manner in which the emails were false or misleading. Furthermore,

1 Plaintiff collectively charges Defendants with the responsibility of sending these allegedly false  
2 emails, which runs afoul of Rule 9(b). Id. at \* 4. Moreover, as will be discussed further below,  
3 the exhibits attached to the Complaint contradict Plaintiff's averment that the emails were  
4 misleading.

5 Plaintiff further alleges the Defendants discovered the emails by "directory  
6 harvest or other illegal means" in violation of 15 U.S.C. § 7704(b)(1) and (2). Complaint ¶ 15.  
7 But in the Complaint, Plaintiff redacts the email addresses to which the alleged "spam" from  
8 Defendants was sent. Therefore, Defendants are without notice to which email address the  
9 emails were actually sent. Further, as stated above, Plaintiff's allegations against Defendants are  
10 collective and vague. More importantly, Plaintiff has not allege the elements required under 15  
11 U.S.C. § 7704(b)(1) and (2), and does not plead anything to support its claim that the emails  
12 were generated in a manner that violates the Act.

13 **D. Plaintiff Fails to State a Claim for Which Relief May Be Granted.**

14 The CAN-SPAM Act, which became effective on January 1, 2004, was enacted to  
15 protect consumers from unwanted commercial e-mail, known colloquially as "spam." The Act  
16 imposes a number of restrictions on sending commercial email, which is defined as messages  
17 that have as their primary purpose a commercial advertisement or a promotion of a commercial  
18 product or service. The CAN-SPAM Act makes it "unlawful for any person to initiate the  
19 transmission, to a protected computer, of a commercial electronic mail message ... that contains,  
20 or is accompanied by, header information that is materially false or materially misleading." 15  
21 U.S.C. § 7704(a)(1). The Act also prohibits a person from initiating the transmission of  
22 commercial email messages if such person has actual knowledge, or knowledge fairly implied on  
23 the basis of objective circumstances, that a subject heading of the message would be likely to  
24 mislead a recipient, acting reasonably under the circumstances, about a material fact regarding  
25 the contents or subject of the message. 15 U.S.C. § 7704(a)(2). "Header information" means the  
26 "source, destination, and routing information attached to an electronic mail message, including  
27 the originating domain name and originating electronic mail address, and any other information  
28 that appears in the line identifying, or purporting to identify, a person initiating the message." 15

1 U.S.C. § 7702(8). As stated above, Plaintiff does not allege how the headers are materially false  
2 or misleading in the Complaint.

3 Imarketing has established and implemented, with due care, reasonable practices  
4 and procedures to effectively prevent violations of the CAN-SPAM Act; any violation thereof,  
5 even if proven to be by Imarketing, occurred despite commercially reasonable efforts to maintain  
6 compliance with such practices and procedures. Regardless, it appears from the exhibits attached  
7 to the Complaint that the headers adequately describe the contents of the email. Furthermore, the  
8 exhibits show the emails were permitted and lawful by virtue of one or all of the following  
9 elements being present:

- 10 a. a clear and conspicuous identification that the email is an advertisement or  
11 solicitation;
- 12 b. an opt-out mechanism allowing the recipient not to receive any further unsolicited  
13 emails from sender;
- 14 c. a working return email address or automated means allowing the recipient to opt-  
15 out of receiving such emails;
- 16 d. a valid physical address of the sender; and
- 17 e. recipient provided affirmative consent to receive such messages.

18 Rule 10(c) of the Federal Ruled of Civil Procedure expressly provides that a  
19 written instrument that is an exhibit to a pleading becomes a part of the pleading for all purposes.  
20 As numerous cases from throughout the federal court system demonstrate, the contents of any  
21 attached writing must be considered by the court in a wide variety of contexts including:  
22 determining the sufficiency of the statement of a claim for relief, and ascertaining the propriety  
23 of the district court's personal or subject matter jurisdiction. Furthermore, by attaching an  
24 exhibit, the pleader often may foreclose recovery on a theory of relief that he claims is available  
25 to him, since the document itself may reveal the existence of an insurmountable defense. Here,  
26 Plaintiff cannot overcome the evidence offered in the exhibits attached to the Complaint, which  
27 show the sender complied with the CAN-SPAM Act.

When granting a motion to dismiss, a court generally required to grant a plaintiff leave to amend, unless an amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir 1990). In determining whether an amendment would be futile, this Court must examine whether Plaintiff could cure the defects in the Complaint without contradicting any of the allegations of the original Complaint. Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). While leave to amend should be granted liberally, an amended complaint cannot allege facts inconsistent with the challenged pleading. Imarketing asserts that allowing Plaintiff to amend the Complaint would be futile.

WHEREFORE, for the above-stated reasons, Defendant Imarketing Consultants, Inc., respectfully requests this Court dismiss the Complaint without leave to amend or, in the alternative, transfer the case to the Southern District of Florida.

Dated: December 21, 2007

13  
14 /s/ Arthur W. Fleishman \_\_\_\_\_  
15 Arthur W. Fleishman, Esquire  
16 CA Bar No.: 222886  
17 McClosky, D'Anna & Dieterle, LLP  
18 2300 Glades Road, Suite 400 East  
19 Boca Raton, FL 33431  
(561) 368-9200 (telephone)  
(561) 395-7050 (facsimile)  
Attorneys for Defendants,  
IMARKETING CONSULTANTS, INC.  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 21, 2007, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorize to receive electronically Notices of Electronic Filing.

//s/ Arthur W. Fleishman  
Arthur W. Fleishman, Esquire  
CA Bar No. 222886

## SERVICE LIST

ASIS INTERNET SERVICES, a California Corporation, vs. IMARKETING CONSULTANTS, INC., dba ULTRA-MX.COM, also dba SPEED NETWORK, also dba SPEED-MX.com, and DOES ONE through FIFTY, inclusive.

Case No.: C 07-05357 CW

Case No.: C 07-03337 CW  
District Court, Northern Dist.

United States District Court, Northern District of California

**Counsel for Plaintiff:**

Jason K. Singleton, Esquire  
lawgroup@sbcglobal.net  
Richard E. Grabowski, Esquire  
rgrabowski@pacbell.net  
Singleton Law Group  
611 "L" Street, Suite A  
Eureka, CA 95501  
Telephone: (707) 441 - 1177  
Facsimile: (707) 441 - 1533  
*Served by CM/ECF*

1 Arthur W. Fleishman, CA Bar No. 222886

2 awf@mdd-law.com

3 McClosky, D'Anna & Dieterle, LLP

4 2300 Glades Road

5 Suite 400, East Tower

Boca Raton, FL 33431

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8 Attorneys for Defendants,  
9 IMARKETING CONSULTANTS, INC., et al.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ASIS INTERNET SERVICES, a California  
corporation,

Plaintiff,

vs.

IMARKETING CONSULTANTS, INC., dba  
ULTRA-MX.COM, also dba SPEED  
NETWORK, also dba SPEED-MX.COM, and  
DOES ONE through FIFTY, inclusive,  
Defendant

Case No.: No. C 07-05357 CW

AFFIDAVIT OF ROBERT CLOUSE

STATE OF FLORIDA                            }  
COUNTY OF PALM BEACH                      }

SS:

BEFORE ME this day, personally appeared Robert Clouse, who being duly sworn

deposes and states:

1. I am over the age of eighteen years.

2. I am the CEO of Imarketing Consultant, Inc. ("Imarketing") and acted as

CEO during the period relevant to the allegations made in the Complaint filed in the above-  
styled action.

4. This affidavit is being submitted in support of Defendants' Motion to

Dismiss and Motion to Transfer Venue to Southern District of Florida.

1           5. If called upon to testify in this matter, I would testify based on my  
2 personal knowledge as to the facts contained in this Affidavit.

3           6. Imarketing is a Florida corporation with its principal place of business is  
4 in Palm Beach County, Florida 33445, which is in the Southern District of Florida.

5           7. Imarketing is not doing business in California, has no employees or  
6 customers in California, does not advertise in California, owns no property in California, does  
7 not have an address or phone listing in California, and is not sending emails to anyone in  
8 California.

9           8. Imarketing's services have always been performed in Palm Beach County,  
10 Florida. Imarketing's past and current employees, who would have knowledge relevant to the  
11 above styled lawsuit are located in Florida and within the area covered by the Southern District  
12 of Florida. Imarketing's business records, information, and documentation related to the claims  
13 in dispute are located in Florida.

14           9. Imarketing has established and implemented, with due care, reasonable  
15 practices and procedures to effectively prevent violations of the CAN-SPAM Act. Any violation  
16 of the CAN-SPAM Act alleged in the Complaint, even if proven to be by Imarketing, occurred  
17 despite commercially reasonable efforts to maintain compliance with such practices and  
18 procedures.

19           FURTHER AFFIANT SAYETH NAUGHT.

20             
21           \_\_\_\_\_  
22           Robert Clouse

23           BEFORE ME, the undersigned authority, this day personally appeared  
24 Robert Clouse, who, after being first duly sworn, deposes and states that he is the person who  
25  
26  
27  
28

1 acknowledged and swore before me that said Affidavit was truthful and complete to the best of  
2 his knowledge and ability.

3 WITNESS my hand and seal in the County and State last aforesaid this 21 day  
4 of December, 2007.

5 NOTARY PUBLIC-STATE OF FLORIDA  
6 Linda S. Dickison  
7 Commission #DD667574  
8 Expires: JUNE 15, 2011  
9 BONDED THRU ATLANTIC BONDING CO., INC.

  
Linda S. Dickison  
Notary Signature

Printed Name: Linda S. Dickison

10 My Commission Expires:  
11  Personally Known to Me  
12  Produced Identification  
13 Type of Identification Produced: \_\_\_\_\_